Hong Leong Bank Bhd v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL WPRJ NO 42–31 OF 2008
LIM YEE LAN J
9 JANUARY 2009

Criminal Procedure — Forfeiture — Dangerous drugs — Forfeiture of vehicle under s 25(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 — Presumption of illegal property — Whether appellant failed to discharge presumption — Whether appellant a bona fide purchaser for valuable consideration within s 33(1) — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 25(2), 33(1), 35

The appellant herein was appealing against the decision of the sessions court in dismissing their claim for the Mercedes Benz E240(A) under s 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') that ordered for the car to be forfeited to the government on the ground that the appellant had failed to prove that the said vehicle was not an illegal property. The said vehicle was seized by the police from Soo Kee Ling who was arrested on suspicion of his involvement in drug trafficking activities. The appellant was the financier of the said vehicle. Although the said vehicle was registered in the name of the hirer, there was an endorsement of ownership claim by the appellant on the vehicle registration card. The appellant had written to the police claiming for the said vehicle. The public prosecutor referred the matter to the Kuala Lumpur Sessions Court to determine the claim of the appellant. The learned sessions court judge held that whilst the appellant had proven that they were lawfully entitled to the said vehicle based on the hire purchase agreement, the appellant however had failed to prove that the deposit and the monthly installments paid by the hirer for the said vehicle were from legal sources. Consequently, the appellant had failed to discharge the presumption in s 35 that the said vehicle was 'illegal property' as defined in s 2(2) of the Act and thus, the said vehicle should be forfeited to the Government of Malaysia. Before this court, the appellant contended, inter alia, that the said vehicle should be returned to them because there was no evidence to show that any offence had been committed under the Act or the Dangerous Drugs Act 1952 in connection with the said vehicle. It was further contended that since s 35 of the said Act does not apply to a proceeding under s 32, the appellant does not owe the burden to proof that the said vehicle was an illegal property. It was further argued that even assuming that the said vehicle was an illegal property, the appellant came under the purview of s 33(1) of the Act

as a bona fide purchaser for valuable consideration because the said vehicle was bought by the appellant from ZMSB at a purchase price of RM300,000 and hired it out to the hirer under the hire purchase agreement.

Held, allowing the appeal:

(1) The proceedings for forfeiture of any property under Part III of the Act can be brought against any person only on the ground that he is a 'liable person' or against any property only on the ground that it is an 'illegal property' derived from any 'prohibited activity' and not otherwise. Any other interpretation given to the Act would lead to an illogical and absurd result unintended by Parliament and defeat the very spirit, purpose and objective behind its enactment in the first place (see para 14).

(2) The facts and circumstances of this case showed that the appellant was not involved in any prohibited activity as defined in the Act in relation to the said vehicle. The evidence before the sessions court also showed that no proceedings for forfeiture of the said vehicle were instituted against the appellant or the hirer under Part III of the Act either as a 'liable person' or in respect of the said vehicle as an 'illegal property'. Instead, the appellant had proved that it was a lawfully constituted licensed bank involved in a legitimate business of financing of cars on hire purchase and the said loan of RM300,000 to the hirer was lawfully given in the ordinary course of its legitimate business. Consequently, the forfeiture of the said vehicle against the appellant was not justified and ran counter to the very purpose and objective in the enactment of the Act (see paras 15–16).

(3) The proper interpretation to be given to s 32(3), from the evidential aspect, is that in a claim under the said section the only burden of a claimant is to prove that he is lawfully entitled to the property, in the sense that the property has been lawfully acquired by him through legal means. Once he had discharged that burden, the onus is shifted to the public prosecutor to prove that the property was 'illegal property' and in the absence of such rebuttal evidence, the sessions court was entitled to assume that the property was not an 'illegal property'. Consequently, the only burden on the part of the claimant was to prove, by adducing admissible evidence, that he was lawfully entitled to the property (see paras 31–32).

[Bahasa Malaysia summary

Perayu dalam kes ini merayu terhadap keputusan mahkamah sesyen yang menolak tuntutan mereka ke atas Mercedes Benz E240(A) di bawah s 32(3)

Akta Dadah Berbahaya (Pelucuthakan Harta) 1988 ('Akta') yang memerintahkan kereta tersebut dirampas dan diletakkan dalam bidang kuasa kerajaan atas alasan bahawa perayu gagal membuktikan kereta tersebut bukan harta haram. Kenderaan tersebut disita oleh pihak polis daripada Soo Kee Ling yang ditangkap kerana disyaki penglibatannya dalam kegiatan pengedaran dadah. Perayu merupakan pembiaya kenderaan tersebut. Walaupun kenderaan tersebut didaftarkan atas nama penyewa, terdapat catiteraan tuntutan pemilikan oleh perayu dalam kad pendaftaran kenderaan. Perayu telah menulis kepada pihak polis menuntut kenderaan tersebut. Pendakwa raya merujuk perkara tersebut kepada Mahkamah Sesyen Kuala Lumpur untuk mempertimbangkan tuntutan perayu. Hakim mahkamah sesyen yang bijaksana memutuskan bahawa walaupun perayu berjaya membuktikan bahawa perayu berhak ke atas kenderaan tersebut berdasarkan perjanjian sewa beli, perayu walau bagaimanapun gagal membuktikan bahawa deposit dan ansuran bulanan yang dibayar oleh penyewa kenderaan tersebut adalah daripada sumber yang sah. Akibatnya, perayu gagal mematahkan anggapan di bawah s 35 bahawa kenderaan tersebut merupakan kenderaan haram seperti yang ditafsirkan dalam s 2(2) Akta dan oleh itu, kenderaan tersebut hendaklah dirampas dan diletakkan di bawah bidang kuasa kerajaan Malaysia. Di hadapan mahkamah ini, perayu berhujah, antara lain, bahawa kenderaan tersebut seharusnya dipulangkan kepada perayu memandangkan tiada keterangan menunjukkan adanya kesalahan yang dilakukan berkaitan dengan kenderaan tersebut di bawah Akta tersebut mahupun Akta Dadah Berbahaya 1952. Seterusnya dihujahkan bahawa disebabkan s 35 Akta tidak diguna pakai untuk prosiding di bawah s 32, perayu tidak perlu membuktikan bahawa kenderaan tersebut merupakan harta haram. Ditegaskan selanjutnya bahawa walaupun jika kenderaan tersebut dianggap sebagai harta haram, perayu merupakan pembeli bona fide dengan nilai dalam skop s 33(1) Akta tersebut oleh sebab kenderaan itu telah dibeli oleh perayu daripada ZMSB pada harga belian RM300,000 dan kemudian menyewakannya kepada penyewa di bawah perjanjian sewa beli.

Diputuskan, membenarkan rayuan:

(1) Prosiding merampas apa-apa harta di bawah Bahagian III Akta tersebut boleh dibuat terhadap seseorang semata-mata atas alasan bahawa dia merupakan orang yang bertanggungjawab atau terhadap apa-apa harta semata-mata atas alasan bahawa harta itu merupakan harta haram yang diperoleh daripada kegiatan larangan dan bukan sebaliknya. Sebarang tafsiran yang berlainan terhadap Akta tersebut akan mengakibatkan hasil yang tidak logik dan tak masuk akal yang sememangnya bukanlah niat Parlimen dan tidak bertepatan dengan semangat, tujuan dan objektif apabila peruntukan tersebut digubal pada mulanya (lihat perenggan 14).

(2) Fakta-fakta dan keadaan-keadaan kes ini menunjukkan bahawa perayu tidak terlibat dalam sebarang kegiatan terlarang seperti yang ditafsirkan dalam Akta tersebut berkaitan dengan kenderaan tersebut. Keterangan yang dikemukakan di mahkamah sesyen juga menunjukkan bahawa tiada prosiding penyitaan kenderaan tersebut dibuat terhadap perayu atau penyewa di bawah Bahagian III Akta tersebut, sama ada sebagai orang yang bertanggungjawab atau atas alasan kenderaan tersebut adalah harta haram. Malah, perayu berjaya membuktikan bahawa perayu merupakan bank berlesen yang terlibat dalam perniagaan pembiayaan sewa beli kereta. Pinjaman sebanyak RM300,000 yang diberikan kepada penyewa itu adalah sah di sisi undang-undang dalam urusan lazim perniagaannya. Penyitaan kenderaan tersebut tidak wajar dan bertentangan dengan maksud dan tujuan penggubalan Akta tersebut (lihat perenggan 15–16).

(3) Pentafsiran yang sewajarnya diberikan kepada s 32(3), dari segi keterangan, adalah bahawa di dalam sesuatu tuntutan di bawah seksyen tersebut, satu-satunya beban penuntut adalah untuk membuktikan bahawa dia berhak di sisi undang-undang terhadap harta tersebut, di mana harta tersebut diperoleh secara sah. Apabila berjaya melepaskan beban tersebut, maka beban berpindah pula kepada pendakwa raya untuk membuktikan bahawa harta tersebut merupakan harta haram dan dalam ketiadaan keterangan yang boleh mematahkan fakta tersebut, mahkamah sesyen berhak untuk menganggap bahawa harta tersebut bukan harta haram. Oleh itu, pihak penuntut hanya perlu membuktikan dengan mengemukakan keterangan yang boleh diterima bahawa dia berhak di sisi undang-undang ke atas harta tersebut (lihat perenggan 31–32).]

Notes

For a case on dangerous drugs, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1932–1953.

Cases referred to

BBMB Kewangan Bhd v Tan Swee Heng & Anor [2002] 7 CLJ 377, HC (refd)

Butterworth Used Cars Sdn Bhd lwn Mayban Finance [1991] 1 CLJ (Rep) 520 (refd)

Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corporation & Anor [1976] 1 MLJ 83 (refd)

Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514; [1993] 4 CLJ 98, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (folld)

Leong Poh Shee v Ng Kiat Chong [1966] 1 MLJ 86, HC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)
Pendakwa Raya v Lee Kee Seng & Anor [2005] 7 MLJ 336, HC (refd)
Public Finance Bhd v PP [1999] 4 MLJ 143, HC (refd)
PP v Tan Lee Kok [1998] 2 MLJ 65, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952
Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2, 2(2), 3(2), (3), 7, 7(1), 7(1)(a)(ii), 8, 9, 10, 11, 12, 13, 14, 25, 26, 28, 32, 32(1), 32(1)(c), (3), 33(1)
Evidence Act 1950 s 101
Federal Constitution art 149
Hire Purchase Act 1967 s 2(2)

Wong Kian Kheong (Karen Lee Foong Voon with him) (Wong Kian Kheong) for the appellant
Maziah bt Abu (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lim Yee Lan J:

BACKGROUND

[1] This is an appeal by the appellant against the decision of the learned Kuala Lumpur Sessions Court judge (SCJ) who had dismissed the appellant's claim for a Mercedes Benz E240(A) with licence plate WKN 18 ('the said vehicle') under s 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') and ordered that the car be forfeited to the government on the ground that the appellant had failed to prove that the said vehicle was not illegal property.

[2] Section 32(3) of the Act under which the claim was made reads as follows:

> 32 Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto.
>
> (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —
>
> (a) no prosecution for any offence under any law is instituted with regard to such property;
>
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
>
> (c) no claim in writing is made by any person that he is lawfully

A entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

B (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

C (3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

F

FACT OF THE CASE

[3] On 27 April 2004 at Block 5-11-6, The Corinthian Condominium, G Jalan Binjai, Kuala Lumpur, the police had seized certain properties, inter alia, the said vehicle from a Chinese man by the name of Soo Kee Ling who was arrested on suspicion of his involvement in drug trafficking activities. Soo Kee Ling was subsequently detained under a detention order issued under the Dangerous Drugs (Special Preventive Measures) Act 1985.

H On 13 May 2004, a notice of seizure under s 25(2) of the Act was served on the appellant. On 25 May 2004, the appellant by letter to the police claimed for the said vehicle. On 24 July 2004 the appellant through the law firm of Lee & Lim wrote to the police to claim the said vehicle.

I On 3 August 2004, the public prosecutor ('PP') referred the appellant's claim under s 32(3) of the Act to the Kuala Lumpur Sessions Court. On 4 April 2007 the sessions court held a hearing to determine the claim of the appellant.

During the hearing, the appellant, which was the financier of the said vehicle to Soo Kee Ling ('the hirer'), called one witness, Chin Kar Hooi, its Credit Control Manager ('SP1') to testify. During the inquiry the appellant tendered through SP1 documents pertaining to the hire and purchase agreement dated 6 March 2003 entered into between the hirer and the appellant. SP1 testified that the appellant provided financing for the said vehicle in the amount of RM300,000 to the hirer who had bought the vehicle at a purchase price of RM451,987.50 from Zaibi Motor Sdn Bhd ('ZMSB'). The hirer had paid a deposit of RM151,989.50 to ZMSB. The appellant then entered into a hire purchase agreement with the hirer in which the latter agreed, inter alia, to repay the loan by way of 60 monthly installments of RM5,875 per month to the appellant. The said vehicle was registered in the name of the hirer in the vehicle registration card of the said vehicle but there was an endorsement of ownership claim by the appellant on the vehicle registration card. It was also revealed through SP1 that up to the date of the seizure the hirer had paid 13 monthly installments to the amount of RM76,365. SP1 also stated that there was an outstanding installment amount of RM 32,7606.70 from the hirer for which a notice of demand was issued and subsequently judgment was obtained against the hirer for the amount of RM249,531.69. During cross-examination, the learned DPP questioned SP1 whether he knew the hirer's source of funds for the deposit and whether he agreed that the deposit and monthly installments from the hirer originated from proceeds of illegal drugs to which questions SP1 answered he had no knowledge of the two matters.

DECISION OF THE SESSIONS COURT

[4] The gist of the decision of the learned SCJ as stated in his grounds of judgment is as follows.

It was held in *Public Prosecutor v Tan Lee Kok* [1998] 2 MLJ 65 by the Court of Appeal that s 32(3) of the Act places no burden on the PP to prove anything and his role in referring the claim to the sessions court was merely as a 'forwarding agent' and nothing more and the burden is on the claimant to prove that he is lawfully entitled to the property.

In *Public Finance Bhd v Public Prosecutor* [1999] 4 MLJ 143 the Kuala Lumpur High Court had held that the presumptions in s 35 of the Act apply to a claim made under s 32. Section 35 of the Act reads as follows:

> 35 Presumption as to liable person and illegal property. Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

A It was also held in *Public Finance Bhd v Public Prosecutor* that in a claim made under s 32(1) of the Act it is incumbent on the claimant to prove the following three elements:

(a) no offence has been committed under the Act or the Dangerous Drugs Act 1952 in respect of the said vehicle;

B

(b) by virtue of the presumption in s 35 of the Act, the vehicle was not illegal property; and

(c) the claimant is legally entitled to the vehicle.

C It was also held by the Penang High Court in the case of *Pendakwa Raya v Lee Kee Seng & Anor* [2005] 7 MLJ 336, in which the facts were similar if not identical to the facts of this case, by Mohamad Zabidin JC (as he then was) in the following manner:

D Adalah jelas dalam kes ini beban adalah di atas Hong Leong Finance untuk membawa keterangan bagi menolak anggapan yang timbul iaitu Lee Kee Seng dan/atau Loh Kah Hock bukan *liable person* dan kereta PDR2837 bukan *illegal property*.

Persoalannya adakah beban ini telah dipenuhi. Dari keterangan wakil Hong Leong
E Finance dapat dilihat bahawa responden kedua iaitu Hong Leong Finance telah berjaya membuktikan pada masa kereta tersebut diperolehi RM70,000 dari harga belian adalah dari sumber yang sah iaitu dari wang pinjaman yang diberi oleh Hong Leong Finance. Walaupun begitu tiada keterangan untuk membuktikan bahawa RM50,000 yang dibayar oleh Loh Kah Hock adalah dari sumber yang sah.
F Selain dari itu keterangan juga jelas bahawa setakat tarikh kereta ditahan Loh Kah Hock telah membayar balik RM40,835 dari RM70,000 yang dipinjam. Tiada keterangan menunjukkan bahawa RM40,835 ini adalah dari sumber yang sah. Ini menjadikan kesemuanya RM90,835 yang tidak dibuktikan sebagai dari sumber yang sah.

G *Illegal property* seperti ditakrif bawah s 2 Akta adalah antara lain 'any property, whether within or outside Malaysia:

(a) which is wholly or partly derive or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act;'

H

Oleh itu untuk mematahkan anggapan bahawa kereta tersebut bukan *illegal property* perlu dibukti bahawa keseluruhan harga belian dan pembayaran balik pinjaman adalah dari sumber yang sah. Ini telah gagal dilakukan oleh Hong Leong Finance. Hanya dengan membuktikan bahawa sebahagian harga belian
I adalah dari sumber yang sah tidak mencukupi untuk mematahkan anggapan tersebut.

Basing on the aforesaid authorities, the learned SCJ held that whilst he was satisfied, based on the oral evidence of SP1 and other documentary evidence especially the hire purchase agreement between the appellant and the hirer

tendered through SP1, that the appellant had proved that it was lawfully entitled to the said vehicle (based on the decisions in *BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] 7 CLJ 377, *Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corporation & Anor* [1976] 1 MLJ 83 and *Butterworth Used Cars Sdn Bhd lwn Mayban Finance* [1991] 1 CLJ (Rep) 520), and that there was neither a charge nor conviction against the hirer in respect of any offence under the Dangerous Drugs Act 1952 ('DDA') in respect of the said vehicle, he was however of the view that the appellant had failed to prove that the deposit and the monthly installments paid by the hirer for the said vehicle were from legal sources. This was because SP1 was unable to confirm during cross-examination by the DPP that the deposit paid by the hirer amounting to RM151,987.50 and the 13 monthly installments for the vehicle paid by the hirer amounting to RM76,365 were from legal sources. Consequently, the appellant failed to discharge the presumption in s 35 that the said vehicle was 'illegal property' as defined in s 2(2) of the Act and the said vehicle should be forfeited to the Government of Malaysia.

THE PROSECUTION'S SUBMISSION

[5] In this appeal before me both parties had submitted written submissions for my consideration. The PP maintained its submission before the learned SCJ and its written submission, and the authorities cited therein, basically echoed the grounds of judgment of the learned SCJ.

THE APPELLANT'S SUBMISSION

[6] Learned counsel for the appellant, Mr Wong Kian Kheong and Karen Lee Foong Voon, on the other hand, advanced the following grounds in their written submission on why the said vehicle should be returned to the appellant under s 32(3) of the Act:

(a) there was no evidence to show that any offence had been committed under the Act or the DDA in connection with the said vehicle;

(b) s 35 of the Act does not apply to a proceeding under s 32 of the Act. Consequently the appellant had no burden of proof that the said vehicle was illegal property as defined in s 2(2) of the Act. The burden of the appellant as provided in s 101 of the Evidence Act was only to prove that it was lawfully entitled to the vehicle. The appellant had duly discharged its burden by adducing the relevant Hire Purchase Agreement and documents relating thereto which proved that viz-a-viz the hirer it was lawfully entitled to the said vehicle;

(c) even assuming that s 35 of the Act applies to a proceeding under s 32(3) of the Act, in this case the appellant had succeeded in proving, on a balance of probabilities, that the said vehicle was not illegal property

within the meaning of s 2(2) of the Act and that it was the owner of the vehicle pursuant to a hire and purchase agreement entered into between the hirer and the appellant where the appellant was the owner and Soo Kee Ling was the hirer as defined in s 2(2) of the Hire-Purchase Act 1967 (see *BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] 7 CLJ 377, *Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corporation & Anor* [1976] 1 MLJ 83 and *Butterworth Used Cars Sdn Bhd lwn Mayban Finance* [1991] 1 CLJ (Rep) 520).

(d) further, even assuming that the said vehicle was illegal property, the appellant came under the purview of s 33(1) of the Act as a bona fide purchaser for valuable consideration because the said vehicle was bought by the appellant from ZMSB at a purchase price of RM 300,000 and hired out to the hirer under the hire purchase agreement; and

(e) this appeal must be allowed taking into account the purpose of the Act and the objective of the Hire-Purchase Act.

FINDINGS AND DECISION

[7] Having read the notes of proceedings and the grounds of judgment of the learned SCJ in the appeal record and the written submissions of both parties and the authorities cited therein, it is my considered view that this appeal should be allowed and the car should be returned to the appellant as the rightful owner.

[8] I wish to state that in arriving at my findings I have agreed entirely and adopted the written submission of the learned counsel for the appellant dated 28 October 2008 which to my mind states the correct position of the law under the Act as it was intended by Parliament. Without wishing to detract or subtract from the submission of learned counsels for the appellant, I just wish to elaborate on the following two points raised in their submission.

[9] The first point is that it is very important for every one involved in the administration of this Act, namely the public prosecutor, the police and the courts, to understand the true objective and purpose of this Act lest its implementation leads to a result that was unintended by Parliament.

[10] It is clear from its preamble that this Act was made pursuant art 149 of the Federal Constitution and its avowed purpose and objective is 'to make provisions for offences in relation to property, and for the seizure and forfeiture of property, connected with activity related to offences under this Act, the Dangerous Drugs Act 1952, or any foreign law corresponding to, these Acts or to the provisions for offences under these Acts; for assistance; to

foreign countries in relation to matters connected with dangerous drugs; and for matters connected with the aforesaid provisions'.

[11] The preamble went on further to state that the Act was necessitated by action which has been taken and being threatened by a substantial body of persons both inside and outside Malaysia:

(1) to organise and carry out trafficking in dangerous drugs, including their importation into and exportation from Malaysia;

(2) to spread the dependence on dangerous drugs among various classes of people in Malaysia, thereby causing widespread detriment to public health, security, safety and morals; and

(3) to acquire property by trafficking in dangerous drugs and to utilise property for such trafficking;

and such action taken and threatened is prejudicial to public order in Malaysia and that Parliament considers it necessary to stop such action by enacting this Act (Emphasis added).

[12] The Act then goes on to give effect to such purpose and objective by providing for offences in relation to property under Part II, for forfeiture of property of liable persons (as defined in s 2(2)) by way of proceedings under Part III, for seizure of movable and immovable property suspected to be illegal property (as defined in s 2) and for assistance to a foreign country.

[13] Part III of the Act which deals with the forfeiture of property of 'liable persons' covers ss 7 to 14. Section 2(2) of the Act defines a 'liable person' as 'a person referred to in s 7 as being liable to be proceeded against under Part III' and s 7(1) provides that the following persons shall be liable to be proceeded against under this Part, viz:

(a) every person —

(i) who has been finally convicted of an offence under section 3, 4, or 24(7), or under a foreign law corresponding to these sections, or of a Scheduled offence, committed at any time after the commencement of this Act;

(ii) *who is or was detained after the commencement of this Act pursuant to an order of detention or restriction made under any law, in respect of any activity relating to or involving the trafficking in any dangerous drug*:

Provided that the activity forming the ground of detention took place after the commencement of this Act;

(iii) who holds, conceals, receives, or uses or causes or allows to be used, any illegal property, knowing or having reason to believe the same to be illegal property;

(b) every relative of a person referred to in paragraph (a);

(c) every associate of a person referred to in paragraph (a);

(d) any holder, whether or not a relative as is referred to in paragraph (b), or an associate as is referred to in paragraph (c), (hereinafter in this paragraph referred to as the 'present holder') of any property which was at any time previously held by a person referred to in paragraph (a) unless the present holder or, as the case may be, any one who held such property after the person referred to in paragraph (a) and before the present holder, is or was a purchaser of the property in good faith for valuable consideration;

(e) where a person referred to in paragraph (a), (b), (c) or (d) is deceased, his personal representative, or, where there is no personal representative, such person or persons having a beneficial interest in the estate of the deceased as may be specified by a Sessions Court upon application by the Public Prosecutor and after the Sessions Court has given an opportunity to such person or persons to be heard in the matter.

The term 'illegal Property', in turn, is defined as any property, whether within or outside Malaysia:

(a) *which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act*;

(b) which is the income, earnings or assets wholly or partly derived or obtained from or by means of any property referred to in paragraph (a);

(c) which is wholly or partly derived or obtained from or by means of any property referred to in paragraph (a) or (b);

(d) which is wholly or partly traceable or attributable to any property referred to in paragraph (a), (b), or (c), or to any income, earnings or assets of any such property;

(e) which, after the commencement of this Act, is or was used to assist or facilitate any prohibited activity;

(f) which is the subject matter of an offence under section 3, 4, or 24 (7) or of any Scheduled offence committed after the commencement of this Act; or

(g) which, due to any circumstance such as, but not limited to, its nature, value, location or place of discovery, or the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in the foregoing paragraphs, can be reasonably believed to be property falling within the scope of any of the foregoing paragraphs.

While a '*prohibited activity*' is defined as 'any act, activity, or conduct taking place in whole or in part within or outside Malaysia which (a) constitutes an offence under section 3 or 4 of this Act, or under any foreign law corresponding thereto or which constitutes a Scheduled offence; or (b) although not constituting such an offence, is of such a nature or occurs in such circumstances that it could be reasonably believed therefrom that it would have ultimately resulted in or led to the commission of such an offence'.

[14] A perusal of s 7 of the Act under Part III of the Act makes it very clear that proceedings for forfeiture of any property under Part III of the Act can be brought against any person only on the ground that he is a *liable person* or against any property only on the ground that it is *illegal property* derived from any 'prohibited activity' and not otherwise. Any other interpretation given to the Act would lead to an illogical and absurd result unintended by Parliament and defeat the very spirit, purpose and objective behind its enactment in the first place.

[15] In this case, the facts and circumstances showed that the appellant: was not involved in any *prohibited activity* as defined in the Act in relation to the said vehicle. The evidence before the sessions court also showed that no proceedings for forfeiture of the said vehicle were instituted against the appellant or the hirer under Part III of the Act either as a *liable person* (although the hirer was a *liable person* by virtue of the definition give in; s 7(l)(a)(ii)) or in respect of the said vehicle as an illegal property. Instead, the appellant had proven by admissible evidence that it is a lawfully constituted licensed bank involved in a legitimate business of financing of cars on hire purchase and the said loan of RM300,000 to the hirer was lawfully given in the ordinary course of its legitimate business. The evidence adduced by the appellant, through the oral evidence of SP1 and documentary evidence in the form of the hire purchase agreement dated 6 March 2003 between it and the hirer also showed that viz-a-viz the hirer the appellant was lawfully entitled to the said vehicle, which is the subject matter of the present claim.

[16] Consequently, in my considered view, the forfeiture of the said vehicle against the appellant was not justified and ran counter to the very purpose and objective in the enactment of the Act as elucidated above.

[17] The second point I wish to make is that I agree with learned counsel

A that s 35 of the Act does not apply to a claim under s 32(1) of the Act, irrespective of whether one takes the literal or purposive approach to the interpretation of that section.

B **[18]** It is acknowledged that apart from Part III of the Act, s 32(1) is another provision in the Act which deals with forfeiture of property under certain circumstances.

C **[19]** A perusal of s 32(1) makes it clear that it provides for the forfeiture of properties seized by a police officer pursuant to s 25 or 26 of the Act under the following three circumstances, viz where:

(a) no prosecution for any offence under any law is instituted with regard to such property;

D (b) no proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person that he is lawfully -entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,

E within three months from the date of its seizure, in which case the property shall become forfeited immediately upon the expiration of the said period of three months.

F **[20]** Section 32(2) goes on to provide that where within three months from the seizure of any property under the Act a claim in writing is made thereto; by any person in the terms mentioned in para (c) of sub-s (1), the public prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a sessions court for its decision.

G

[21] Section 3(3) then provides that the sessions court to which a claim is referred under sub-s (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and H upon such appearance or in default of such appearance, upon due service of such summons being proved, the sessions court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the DDA has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released I to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited (it is to be noted that the hirer was not summoned to appear before the SCJ although his whereabouts as a detainee under the Dangerous Drugs (Preventive Measures) Act 1985, was known).

[22] Section 35 of the Act, which falls under Part VI relating to evidence and procedure, reads as follows: **A**

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same. **B**

[23] A literal reading of s 35 shows that it is intended to apply to a proceeding which is brought under this Act *against any person or in respect of any property on the ground that such person is a liable person or such property is illegal property*, which, based on the foregoing discussions, can only refer to a proceeding under Part III of the Act and not otherwise. In other words, the presumption under s 35 would apply to the hirer had proceedings under Part III of the Act been taken against him by the PP on the basis of him being a *liable person* and the said vehicle an *illegal property*. **C** **D**

[24] It is also my view that had s 35 been intended to apply to all proceedings, including a claim made under s 32(1), under the Act, it would have used words to such effect as 'In all proceedings under this Act' minus those qualifying words in italics. **E**

[25] My view is also fortified by the heading in s 32 of the Act which states that it applies to 'forfeiture of property seized under the Act where there is no prosecution, or no proceedings under Part III or no claim thereto'. **F**

[26] Thus, while an inquiry under s 32 is a *proceeding* under the Act, it is however not a *proceeding brought by* the PP against any person *on the ground* that he is a *liable person* or on the ground that the property is *illegal property*. **G**

[27] Consequently, a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and hence the presumptions therein that the court shall presume a person to be a liable person and a property to be an illegal property does not apply to a proceeding under s 32 of the Act. It is to be emphasised that the Court of Appeal in *Public Prosecutor v Tan Lee Kok* did not touch at all on the relationship between s 32 and s 35 of the Act, its focus being more on the difference in the procedures between a s 8 and 32 proceeding under the Act. **H** **I**

[28] In fact, to my mind, s 32 can never apply to a situation where the PP has reasonable grounds to believe that any property, including property seized by the police pursuant to s 25 or 28, is illegal property, 'because had that been

A the case, it would have been incumbent on the PP to take proceedings in respect of the property, which in this case is under s 7(1)(a)(ii) of Part III of the Act.

B **[29]** Further, the very fact that the PP acts as a postman or a 'forwarding agent' (per Shaik Daud JCA in *Public Prosecutor v Tan Lee Kok*) in referring a claim to the sessions court under s 32(3) of the Act further implies that the PP has reasonable grounds, based on police investigation, to believe that the property is not illegal property.

C **[30]** Thus, to my mind, s 32 is applicable, inter alia, to a situation where subsequent to the seizure of any property under the Act by the police, the PP has reasonable grounds to believe, based on the investigation report of the police, that the property is not illegal property and a claim is made within three months of the seizure of the property by a person claiming to be D lawfully entitled thereto or where there are two or more persons claiming to be lawfully entitled to the property, and the PP is uncertain as to the person who is lawfully entitled thereto (as this case), in which case it is incumbent on the PP to refer the claim to the sessions court for its determination.

E **[31]** Bearing in mind the true objective and purpose of the Act as reflected in its preamble and the effect of s 35 of the Act, it is my considered view that the proper interpretation to be given to s 32(3), from the evidential aspect, is that in a claim under the said section the only burden of a claimant is to F prove that he is lawfully entitled to the property, in the sense that the property has been lawfully acquired by him through legal means. Once he had discharged that burden, the onus is shifted to the public prosecutor to prove, by rebuttal evidence through the investigating officer of the case, that the property is illegal property and in the absence of such rebuttal evidence G the sessions court is entitled to assume that the property is not illegal property.

[32] In other words, once a claim is referred to the sessions court by the PP under s 32 of the Act, the court is entitled to assume and presume that (1) H no offence under the Act or under the DDA has been committed in respect of the property and (2) that such property is not illegal property. Consequently, the only burden on the part of the claimant is to prove, by adducing admissible evidence, that he is lawfully entitled to the property.

I **[33]** Applying s 32 in the manner in which I think it should be interpreted to the facts of this case, it is my considered view that once the appellant has proved that it was lawfully entitled to the said vehicle, as was done through the oral evidence of SP1 and the hire purchase agreement between it and the hirer, there was no further burden on the appellant to prove that the deposit

and monthly installments paid by the hirer were not through legal means. Instead, the burden is on the PP, if it has evidence to the contrary based on police investigation, to introduce rebuttal evidence that the property was illegal property or take proceedings under Part III of the Act against Soo Kee Ling who, by virtue of the definition in s 2(2) of the Act, is a 'liable person' under s 7(1)(a)(ii) of the Act. Indeed as a private commercial entity the appellant had either the investigative power or duty to investigate into the financial affairs of the hirer or as to the means of his income. Neither was it the law under the Hire Purchase Act that the appellant had a duty to obtain any statutory declaration from the hirer that payments made by him under the hire purchase agreement were from legal sources. To the contrary the PP had all the powers and resources at its disposal from police investigation on whether the sources of the hirer's incomes were derived wholly or partly from a *prohibited activity* and if so to take proceedings for forfeiture of any property suspected to be *illegal property* under Part III of the Act, in which case the presumptions in s 35 of the Act section that any such property was *illegal property* would apply until it is proven to the contrary by admissible evidence by the hirer.

[34] In this case, no proceedings were instituted by the PP against the hirer pursuant to Part III of the Act. Neither was any rebuttal evidence adduced by the PP during the proceeding under s 32(3) of the Act that the money for the deposit and monthly installments paid by the hirer were from illegal means. Consequently the PP had failed to discharge its burden of proving that the said car was illegal property for which proceedings could be taken against the hirer under Part III of the Act.

[35] Based on the foregoing reasons, I hereby allow the appeal and order that the said vehicle be returned to the appellant as the rightful owner with immediate effect.

APPLICATION FOR STAY

[36] After I have delivered my decision the learned DPP, Puan Maziah bt Abu, applied orally for stay pending appeal by the PP on the ground that the appeal would be rendered nugatory if stay is refused. Learned counsel for the appellant, Mr Wong Kian Kheong, strongly objected to the stay on the ground that the car had been seized and left in an the open since 2004 and its value had deteriorated considerably and the appellant need to sell it quickly in order to mitigate its losses. Learned counsel further submits that the appellant is in a position to compensate the government the current value of the car in the event it succeeds in its appeal. After hearing submissions of both parties I had dismissed the learned DPP's oral application for stay of

execution of my judgment.

NOTE

[37] Learned counsel had subsequently vide a letter dated 12 January 2007 which was copied to the learned DPP, drew my attention to the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 in which the Federal Court had expounded on the principles: relating to the stay of executions of judgments pending appeal. Augustine Paul JCA (as he then was) in the course of his judgment on behalf of the Federal Court held that stay of executions could only be justified based on special circumstances. His Lordship further held, following the cases of *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514; [1993] 4 CLJ 98 and *Leong Poh Shee v Ng Kiat Chong* [1966] 1 MLJ 86 and *Ming Ann Holdings Sdn Bhd v Danaharta Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380, that 'special circumstances', as the phrase implies, must be special, and not ordinary, common or usual circumstances and that which go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). It was also held that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. In other words a special circumstance is the genus of which nugatoriness is a species. The onus is on the applicant to advance grounds in support of its application to demonstrate the existence of special circumstances to justify the grant of stay of execution. They must be deposed in the affidavit filed in support of the application.

[38] Coming back to the case before me, I agree with the appellant that the PP had failed to advance any ground by affidavit to demonstrate how his appeal would be rendered nugatory if stay was refused. On the other hand, it is my considered view that the appellant which is a financial institution is in a position to reimburse the current market value of the car to the government in the event it succeeds in the appeal. In other words, the PP has failed to prove the existence of special circumstances to justify a stay of execution of my judgment, which is the return of the said vehicle to the appellant as the rightful owner. Consequently, based on the authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbaguna Makmur Bhd*, I am of the considered view that my initial decision to dismiss the PP's application for stay of execution pending appeal was fully justified and correct in law.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed